under ss. 37(d) and 37(da)(vi) of the Dangerous Drugs Act 1952 on the balance of probabilities. As the quantities of the dangerous drugs, namely the 729.51 grammes of cannabis are more than the amount stipulated in s. 37(da)(vi) of the Dangerous Drugs Act 1952, I am satisfied that he did traffic in and on his own behalf the 729.51 grammes of cannabis on the date and at the time and place mentioned in the charge.

In regard to the evidence of PW1, it is undeniable that as an expert witness, the Court is entitled as of right to accept it on its face value unless such evidence is inherently incredible or the defence calls evidence in rebuttal by way of another expert to contradict or vary the evidence of PW1. The defence did not call another expert to challenge the evidence of PW1. The defence merely cross-examined at length PW1, which in turn further strengthened the prosecution's case (see *Munusamy v. Public Prosecutor* [1987] 1 MLJ 492 SC, *Public Prosecutor v. Lam San* [1991] 3 MLJ 426 SC).

Now when PW1 was recalled by the defence he gave evidence strictly on the definition of cannabis in s. 2 of the Dangerous Drugs Act 1952. PW1's evidence squarely laid to rest any doubt and established once and for all beyond reasonable doubt that the resin has not been extracted.

Having seen and heard the Accused and considered his defence as a whole (in its entirety), I did not believe him. In view of PW2, PW3 and PW8's earlier testimony, I held that the Accused's version was merely a denial, which in the circumstances failed to rebut the presumptions under s. 37(d) and s. 37(da)(vi) of the Dangerous Drugs Act 1952 on the balance of probabilities. Therefore the prosecution had proved its case beyond reasonable doubt and I found the Accused guilty of the offence for which he was charged and convicted him. Accordingly I sentenced him to death.

The accused appeals.

Order accordingly.

PUBLIC PROSECUTOR

v.

PARAMESWARAN A/L K. MUNIANDY & ANOR.

HIGH COURT, TAIPING
DATO' HJ. ABDUL MALIK BIN HJ. ISHAK JC
[PERAK CRIMINAL APPEAL NO. 51-93-92 (89)]
18 NOVEMBER 1992

APPEAL: Power to reverse decision of lower Court on appeal - Public Prosecutor's appeal against acquittal - Third Accused absent during appeal as notice could not be served - Effect of s. 314 CPC when Third Accused does not appear during appeal - Finding of fact - Decision against weight of evidence - Whether appellate Court has jurisdiction to reverse order of acquittal based on finding of facts by lower Court.

DANGEROUS DRUGS: Possession - Offence of possession of heroin in dwelling house - Section 12(2) Dangerous Drugs Act 1952 - Whether both respondents were occupiers of house raided by police - Legal presumption of possession once custody and control is established - Section 37(d) - Legal presumption drug is concealed with knowledge of occupier of premises once drug is found concealed in any premises - Section 37(g) - Both presumptions are rebuttable on balance of probabilities - Whether there must be sufficient exclusivity of possession to make a person an occupier - Definition of 'occupier' - Acquittal by Magistrate after hearing defence evidence.

This was an appeal by the learned DPP against the acquittal of both the respondents by the learned Magistrate upon hearing the defence evidence.

Held:

[1] An appellate Court has jurisdiction to reverse an order of acquittal based on the finding of facts by the trial Judge though it shall be slow to disturb the finding of facts arrived at by a Judge who had the advantage of seeing the witnesses.

[2] However, the appellate Court shall scrutinize the whole evidence in its totality and shall be satisfied whether the order of acquittal was against the weight of the evidence as a whole. Applying these principles, the Court proceeded to hear the appeal.

[3] Both the respondents had custody and control of the drugs in the Milo tin, hence, they are deemed to be in possession and deemed to know the nature of such drugs under s. 37(d) of the Dangerous Drugs Act 1952. Furthermore, being occupiers of the said house both the respondents had, under s. 37(g) of the Dangerous Drugs Act 1952, knowledge of the nature of the concealed drugs in the Milo tin.

[4] In the light of the evidence, it can be said that the heroin was in the joint custody of both the respondents and under their joint control.

[5] It is trite law that mere denial is not sufficient to reasonably dislodge the prosecution's evidence. In this case, the defence in its endeavour to rebut the statutory presumptions offered an outright denial and nothing more.

[6] Upon scrutiny of the whole evidence, the learned Magistrate has obstinately blundered and misdirected herself on certain aspects of the evidence which led her to reach a distorted conclusion so as to produce a positive miscarriage of justice.

[Appeal allowed. Order of Acquittal set aside and substituted with two years imprisonment with effect from 18 November 1992 and each respondent to receive two strokes of the ratten].

Cases referred to:
Sheo Swarup v. R [1934] AIR PC 227 ***(foll)***
Nur Mohamed v. R [1945] AIR PC 151 ***(foll)***
Goh Ah San v. King [1938] MLJ 95 ***(foll)***
Lee Sang Cheah v. R [1946] MLJ 22 ***(foll)***
Lim Kheak Teong v. PP [1985] 1 MLJ 38 / [1984] 2 CLJ 219 ***(foll)***
Akin Khan bin Abdul Rahman v. PP [1987] 2 MLJ 217 SC / [1987] 1 CLJ 348 ***(cit)***
Awaluddin bin Suratman & Ors. v. PP [1992] 1 MLJ 416 / [1991] 3 CLJ 2459 ***(foll)***
PP v. Shaari [1963] MLJ 22 ***(foll)***
PP v. Yuvaraj [1969] 2 MLJ 89 PC ***(foll)***
Ilian & Anor. v. PP [1988] 1 MLJ 421 ***(foll)***
R v. Carr Briant [1943] KB 607 ***(foll)***
R v. Too [1976] 2 All ER 65 ***(foll)***
Low Geok v. PP [1982] 2 MLJ 346 / [1982] 1 CLJ 38 ***(foll)***
Bright v. Police [1972] NZLR 1916 ***(refd)***
Leow Nghee Lim v. Reg. [1956] 22 MLJ 28 ***(refd)***
D.A. Duncan v. PP [1980] 2 MLJ 195 FC ***(foll)***
PP v. Ling Tee Huah [1982] 2 MLJ 324 ***(foll)***

Legislation referred to:
Courts of Judicature Act 1964, s. 66
Criminal Procedure Code, ss. 257, 314
Dangerous Drugs Act 1952 ss. 37(d) & (g), 12(2) & (3), 39(A)(1)

Other sources referred to:
Mallal's Digest of Malaysian and Singapore case law p. 296

For the Public Prosecutor - Murtazadi Ahmad, DPP
For the respondents - Unrepresented

JUDGMENT

Dato' Hj. Abdul Malik Bin Hj. Ishak JC: This is an appeal by the Public Prosecutor against the decision of the learned Magistrate, Magistrate's Court Taiping, Perak upon the acquittal of both the respondents on the following joint charge:

> Bahawa kamu pada 11 February 1988 jam lebih kurang 2.30 pagi, di rumah No. 29 Ulu Tupai, Pokok Assam, di dalam Daerah Larut dan Matang, di dalam Negeri Perak, sebagai seorang yang tidak dikuatkuasakan di bawah Akta Dadah Merbahaya 1952 atau mana-mana peraturan yang dibuat di bawahnya untuk memiliki dadah, dimana Bahagian IV Akta Dadah Merbahaya 1952 berkaitan, telah didapati memiliki (3) tiga bungkusan plastik kecil mengandungi 2.46 gram, bertentangan dengan s. 12(2) Akta Dadah Merbahaya 1952 dan dengan itu kamu telah melakukan suatu kesalahan di bawah s. 12(3) Akta Dadah Merbahaya 1952 dan boleh dihukum di bawah s. 39A(1) Akta yang sama (Pindaan 1986).

The respondents claimed trial to the charge. A *prima facie* case having been established against them the learned Magistrate called for their defence. Having heard their defence the learned Magistrate duly acquitted and discharged them.

The facts adduced by the prosecution are as follows:

Acting on information received a police party led by ASP Ahmad Megat Hussain raided house No. 29 Ulu Tupai, Pokok Assam, Taiping at 2.30 a.m. (the said house). The said house was locked from inside and upon calling the occupants of the said house, a male Indian opened the front door of the said house. It was through this door that the police gained entrance to the said house. Two other male Indians were in the bedroom. The three male Indians were the occupiers of the said house. The police conducted a search in the said house in the presence of the three male Indians. In the course of the examination, Inspector Syed Talib found in the kitchen portion of the said house a Milo tin. In this Milo tin (P3)

there was one plastic package. Inside the plastic package there were three plastic packages (P4) containing substances believed to be heroin. The three male Indians (amongst them the two respondents) were then arrested and brought to Pokok Assam police station. Upon arrival at the said police station, the said ASP lodged a police report *vide* Pokok Assam Report No. 281/88 (P2). A search list (P1) was also issued to the two respondents and the third male Indian (hereinafter referred to as "T").

Inspector Syed Talib corroborated the evidence of the said ASP in material particulars. In particular, the discovery of the Milo tin and the subsequent examination of it, was done in the presence of the two respondents and T.

It was also in evidence that the said house was closed when the police party arrived, that the kitchen was used, that the owner of the said house was not known, that there was no one else in the said house except the two respondents and T (when the police raided the said house), that the two respondents and T were shocked and that they did not try to run away and lastly there was a house under repair next to the said house.

Subsequently the incriminating exhibits were sent to the chemist who analysed and confirmed it to be 2.46 grammes of heroin. A chemist report (P7) was issued and duly served on the two respondents and T.

As earlier mentioned the learned Magistrate having heard the evidence of the prosecution witnesses called upon the two respondents and T to enter their defence.

Both respondents gave their evidence on oath. Their defence was a total denial of the following:

(1) The Milo tin did not belong to them.
(2) They did not know of the existence of the Milo tin in the said house (by necessary inference they did not know of the existence of the heroin).
(3) They did not cook in the kitchen, they ate outside.

In his defence, the first respondent stated that:

(1) He stayed in the said house for about a week prior to the police raid.
(2) The police found the Milo tin in the said house, but he could not precisely mention the place as he did not see at the material time when the police recovered it.
(3) He was requested by his father (DW4) to assist T to build a house at Jalan Tupai.

The second respondent in his defence stated that:

(1) At the material time he stayed at the said house for about a week.
(2) He was directed by his father (DW4) to assist T to build a house at Jalan Tupai.
(3) When the police raided the said house he was asleep.
(4) The police recovered the Milo tin and showed the contents to them (meaning the three occupants of the said house).
(5) He did not know why the police raided the said house.
(6) The window and the door of the said house was closed and the three of them were inside the said house.
(7) No one in the said house could run away.

The father (DW4) of both respondents also gave evidence. In his evidence (DW4) stated that the said house belonged to him. That he requested both respondents (his children) and T (his brother) to stay at the said house temporarily. Both respondents and T were building a house in that vicinity. No one else stayed in the said house. Before this the said house was occupied by his parents, but since the death of his mother, his father moved out of the said house and stayed with him in Bagan Serai. The said house became vacant and was locked.

The said house was occupied for one month by both respondents before their arrest. According to DW4, there was a kitchen in the said house but all the household goods were taken away when DW4's father moved to Bagan Serai.

The learned Magistrate in her judgment stated that the presumption under s. 37(d) of the Dangerous Drugs Act 1952 had been rebutted on the balance of probabilities principally through the evidence of the defence witnesses. She stated that she believed the defence story and in the circumstances acquitted and discharged both respondents. At this juncture it is pertinent to point out that during the trial at the Magistrate's Court both the respon-

dents and T were represented by Counsel. During the appeal, however, both the respondents were present and unrepresented. T was absent during the appeal. The notice against T cannot be effected. Notwithstanding the absence of T at the appeal, I proceeded to hear arguments bearing in mind the provisions of s. 314 of the Criminal Procedure Code. I did not make any order in the matter of the appeal adverse to or to the prejudice of T.

The principles governing an appellate Court's power to reverse the decision of the lower Court can be distilled from the case of *Sheo Swarup v. R* [1934] AIR PC 227. Lord Russel in that case took the view that the Code gives to the High Court power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. Lord Thankerton in the case of *Nur Mohamed v. R* [1945] AIR PC 151 echoed the same sentiment when he said (after referring to *Sheo Swarup*) that:

> ... there really is only one principle, in the strict sense of the word, laid down there, that is, that the High Court has full power to review all the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed.

Nearer to home, is the case of *Goh Ah San v. King* [1938] MLJ 95 where it was held that although an appellate Court is reluctant to reverse a Magistrate's Court decision on a finding of fact, it should set aside the orders of the lower Court if it is of opinion that such decision is against the weight of the evidence. And in the case of *Lee Sang Cheah v. R* [1946] MLJ 22 it was held that in criminal appeals, the Appellate Court should weigh the evidence in a balance and give weight and consideration to such matters as:

(a) the views of the trial Magistrate as to the credibility of witnesses;
(b) the presumption of innocence in favour of the Accused;
(c) the right of the Accused to the benefit of any doubt; and
(d) the slowness of an Appellate Court in disturbing a finding of fact arrived at by a Magistrate who had the advantage of seeing the witnesses.

The Federal Court in the case of *Lim Kheak Teong v. PP* [1985] 1 MLJ 38 felt that the question of law posed was quite elementary but nevertheless gave leave as there was no proper appraisal of *Sheo Swarup's* case *(supra)*. The Federal Court followed the guidelines as stated in *Lee Sang Cheah v. R (supra)*.

The sum total of the above cases would show that though an appellate Court has jurisdiction to reverse an order of acquittal based on the finding of facts by the trial Judge the appellate Court shall not lose sight of certain principles and one of them is that the appellate Court shall be slow in disturbing the finding of facts arrived at by a Judge who had the advantage of seeing the witnesses. It is also clear that the appellate Court shall scrutinize the whole evidence in its totality and shall be satisfied whether the order of acquittal was against the weight of the evidence as a whole.

Applying the above principles, I then proceeded to hear the appeal.

The learned Deputy argued that the learned Magistrate must have been satisfied that the two respondents had custody and control of the incriminating exhibits and that was why their defence was called. Having given their defence, the learned Magistrate ought to decide whether that defence could rebut the presumption under s. 37(d) of the Dangerous Drugs Act 1952. It was the submission of the learned Deputy that the defence did not and could not rebut the presumption under s. 37(d) of the Dangerous Drugs Act 1952. The case of *Akin Khan bin Abdul Rahman v. PP* [1987] 2 MLJ 217 SC was cited. The learned Deputy further argued that since both respondents by their own admission in the defence that they were staying in the said house one week prior to the police raid therefore they had control and custody of the Milo tin and the drugs therein.

I have explained to both respondents the submissions of the learned Deputy following closely the provisions of s. 257 of the Criminal Procedure Code (see *Awaluddin bin Suratman & Ors. v. PP* [1992] l MLJ 416, **Mallal's Digest** of Malaysian and Singapore case law p. 296, and *PP v. Shaari* [1963] MLJ 22).

The second respondent submitted that he never smoked cigarettes nor drink liquor. He had stayed in the said house for about one week before his arrest. His reason for staying in the said house was to build a house on an empty land next to the said house. He said he only squatted in the said house and that the condition of the said house was bad, no one stayed there. He further stated that he did not know of the existence of the exhibits in the said house until the police found it in the kitchen. Hence, he prayed that the order of the learned Magistrate be affirmed.

The first respondent adopted the submission of the second respondent.

There are two legal presumptions that can be invoked against both respondents.

Firstly, the legal presumption under s. 37(d) of the Dangerous Drugs Act 1952 where any person found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall be deemed to have been in possession of such drug and shall be deemed to have known the nature of such drug until the contrary is proved.

Secondly, the legal presumption under s. 37(g) of the Dangerous Drugs Act 1952 where if any dangerous drug is found to be concealed in any premises, it shall be presumed that the said drug is so concealed with the knowledge of the occupier of the premises until the contrary is proved.

These two presumptions are rebuttable and they can be rebutted on the balance of probabilities (*PP v. Yuvaraj* [1969] 2 MLJ 89 PC, *Ilian & Anor. v. PP* [1988] 1 MLJ 421 and *R v. Carr Briant* [1943] KB 607).

It has been said time and again, that there must be sufficient exclusivity of possession to make a person an occupier. (see *R v. Too* [1976] 2 All ER 65, *Low Geok v. PP* [1982] 2 MLJ 346). Here the question to be asked is this: who was the occupier of the premises on which the drugs were found? In *Bright v. Police* [1972] NZLR 1916, an occupier was defined as a person who has the right to use the premises for such purposes as he wishes principally in the case of a dwelling house for the purpose of habitation.

Here, on appraisal of the totality of the evidence (both the prosecution and the defence) the following salient facts are established. That both the respondents stayed in the said house one week before the police raid, DW4 stated that he allowed both the respondents to stay in the said house for one month before the police raided it, DW4 was the owner of the said house, both the respondents were the children of DW4, the said house was bolted from inside at the material time when the police raided it, the drugs were inside a Milo tin placed in the kitchen portion of the said house, the kitchen in the said house was used, only the three of them (both the respondents and T) were in the said house at the material time. In short both the respondents were occupiers of the premises. It can therefore be safely deduced that that was the "family house" and both respondents have the right to use the premises for such purposes as they wish. It was also in evidence that the said house was at one time left vacant and was locked. This happened as a result of the death of DW4's mother. The learned Magistrate also considered this fact. Arising out of this, one fact stands out: at no time did DW4 say that the said house was broken into. DW4 also used to visit the respondents every week to check on their behaviour from the neighbours. Nothing was said by DW4 about the said house.

The learned Magistrate in assessing the evidence of the defence laid too much emphasis on certain factors without taking into account the totality of the evidence. For instance, she laid great stress on the defence version that the two respondents did not cook in the kitchen of the said house and that they ate outside. She failed to take into account at all the evidence of ASP Ahmad Megat Hussain and Inspector Syed Talib that the kitchen was used. She overemphasised the failure of the prosecution to prove ownership of the said house at the stage of the defence case. She failed to take into account the concept of "occupier of the premises" as set out in s. 37(g) of the Dangerous Drugs Act 1952 as opposed to ownership of the said house. She also failed to take into account sufficiently that DW4, the owner of the said house allowed both respondents (his children) and T (DW4's brother) to stay in the said house. In consequence she failed to address her mind that both respondents can be said to be occupiers of the premises at the material time. She missed the point and failed to assess DW4's evidence in

its correct perspective in that DW4 amply supported the prosecution's case that both the respondents were occupiers of the said house. In fact there was evidence that the second respondent was asleep in the said house when the police party raided it. The said house was totally sealed off in the sense that the windows and the doors were locked. In the words of the second respondent no one in the said house could run away. She laid great stress that the respondents denied knowing the presence of the drugs in the said house and also denied that the drugs belonged to them. In so doing she failed to consider the impediment inherent in a defence of this nature.

I am of the considered view that both the respondents had custody and control of the drugs in the Milo tin and hence they are deemed to be in possession and deemed to know the nature of such drugs under s. 37(d) of the Dangerous Drugs Act 1952. Furthermore being occupiers of the said house both the respondents had, under s. 37(g) of the Dangerous Drugs Act 1952, knowledge of the nature of the concealed drugs in the Milo tin.

In my considered view, in the light of the evidence, it can be said that the heroin was in the joint custody of both the respondents and under their joint control. In *Leow Nghee Lim v. Reg.* (1956) 22 MLJ 28, Taylor J. in his judgment at p. 29 said:

> There is no presumption of custody. The presumption is from custody. Unless custody was established, the chain of reasoning is broken. Custody means having care or guardianship; goods in custody are in the care of the custodian and, by necessary implication, he is taking care of them on behalf of someone else. You cannot take care of goods unless you know where they are and have the means of exercising control over them. Custody therefore implies knowledge of the existence and whereabouts of the goods and power of control over them, not amounting to possession.

At p. 30 of the same judgment the learned Judge said:

> A man must know of the existence of a chattel and have some idea of its whereabouts before he can exercise any control over it.

It must be borne in mind that in the instant appeal there were three people (the two respondents and T) present in the said house at the time of the police raid. There was no one else apart from them. All three were jointly charged in Court.

The defence in its endeavour to rebut the statutory presumptions offered an outright denial and nothing more. It is trite law that mere denial is not sufficient to reasonably dislodge the prosecution's evidence. (see *D.A. Duncan v. PP* [1980] 2 MLJ 195 FC, and *PP v. Ling Tee Huah* [1982] 2 MLJ 324). Thus, upon scrutiny of the whole evidence it is my judgment that the learned Magistrate has obstinately blundered and misdirected herself on certain aspects of the evidence which led her to reach a distorted conclusion so as to produce a positive miscarriage of justice. In this event, I have to allow this appeal and set aside the order of acquittal of both the respondents and substitute it with the following order:

Each of the respondents is sentenced to two years imprisonment with effect from 18 November 1992 and each to receive three strokes of the rattan.

One point needs to be made.

On 19 November 1992 Counsel for both respondents (different Counsel from the one appearing in the Magistrate's Court) applied for a stay of execution for a period of one month on the ground that he wanted to refer certain questions of law of public interest to the Supreme Court by virtue of s. 66 of the Courts of Judicature Act. The learned Deputy strenuously objected and argued that leave should be obtained in the Supreme Court before this Court could act accordingly. It would appear that the terms of s. 66 of the Courts of Judicature Act would bar this Court from granting the stay of execution sought for by the learned Counsel. Accordingly, I disallowed Counsel's application.